

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

THOMAS A. WALLING, III,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner  
of the Social Security Administration,

Defendant.

CASE NO. 11cv5204-JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, ECF No. 7; Consent to Proceed Before a United States Magistrate Judge, ECF No. 8). This matter has been fully briefed (*see* ECF Nos. 22, 26, 27).

The ALJ failed in his duty to develop the record regarding plaintiff's alleged hearing loss. Despite objective medical evidence demonstrating plaintiff's hearing loss,

1 the ALJ failed to include limitations in plaintiff's residual functional capacity to account  
2 specifically for hearing loss and did not explain adequately the basis for this failure.

3 Because this error was not harmless, this matter shall be reversed and remanded  
4 pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner for further  
5 administrative proceedings.

### 6 BACKGROUND

7 Plaintiff, THOMAS A. WALLING, III, was born in 1962 and was twenty-six  
8 years old on his alleged date of disability onset of February 28, 1989 (*see* Tr. 157).  
9 Plaintiff has worked in construction (*see* Tr. 271). Plaintiff was seen with complaints of  
10 "chronic intermittent drainage in his right ear and decreased hearing in his right ear" on  
11 August 30, 1990 and on January 2, 1991 (Tr. 318). Dr. Peter Andersen, M.D. assessed "a  
12 potentially life-threatening problem," and indicated that surgery was necessary in order to  
13 remove plaintiff's bilateral cholesteatomas (*id.*). In 1992, plaintiff had two surgeries on  
14 his ears (Tr. 279-81, 302-04).

### 16 PROCEDURAL HISTORY

17 Plaintiff filed applications for disability insurance benefits pursuant to Title II of  
18 the Social Security Act ("the Act") and for supplemental security income pursuant to  
19 Title XVI of the Act (*see* Tr. 7, 157-62). Plaintiff's applications were denied initially and  
20 following reconsideration (Tr. 7, 133-35, 137-38). Plaintiff's requested hearing was held  
21 on his Title II claim, which was denied by a written decision dated February 4, 2009 (*see*  
22 Tr. 7, 65-105). In this decision, the ALJ found that plaintiff was not disabled between  
23  
24

1 February 28, 1989, the alleged onset date and March 31, 1993, the date last insured (*see*  
2 Tr. 63).

3       Following plaintiffs' appeal, the Appeals Council determined that plaintiff had  
4 filed a concurrent Title XVI application in addition to the Title II claim addressed in the  
5 February 4, 2009 written decision (*see* Tr. 7, 44-46). The Appeals Council found that the  
6 February 4, 2009 decision did not adjudicate the appropriate period of time, as it only  
7 covered the period of time until plaintiff's date last insured, and that the Title XVI claim  
8 thereby was not adjudicated properly (*see* Tr. 45). Therefore, the matter was remanded to  
9 the ALJ for further administrative proceedings, including a new decision (Tr. 45). In  
10 doing so, the Appeals Council vacated the February 4, 2009 hearing decision (*see* Tr. 44).

12       A supplemental hearing was held before Administrative Law Judge Richard A.  
13 Say ("the ALJ") on October 28, 2009 (*see* Tr. 106-30). On November 24, 2009, the ALJ  
14 issued a written decision in which he found that plaintiff was not disabled as defined in  
15 the Act from plaintiff's alleged onset date of disability of February 28, 1989 through the  
16 date of the decision (*see* Tr. 4-18).

17       On January 12, 2011, the Appeals Council denied plaintiff's request for review,  
18 making the October 28, 2009 written decision by the ALJ the final agency decision  
19 subject to judicial review (Tr. 1-3). *See* 20 C.F.R. § 404.981. On March 16, 2011,  
20 plaintiff attached his complaint to his Motion to Proceed *in Forma Pauperis* (*see* ECF  
21 No. 1, 5). On July 8, 2011, the sealed administrative record regarding this matter ("Tr.")  
22 was filed by defendant (*see* ECF Nos. 11, 12).  
23  
24

1 In his Opening Brief, plaintiff argues that the ALJ: (1) failed in his duty to develop  
2 the record with respect to plaintiff's hearing loss; (2) failed to evaluate properly  
3 plaintiff's credibility; (3) failed to evaluate properly plaintiff's residual functional  
4 capacity; and (4) failed to evaluate properly lay witness statements (*see* ECF No. 22, pp.  
5 1-2). Plaintiff contends that this matter should be reversed and remanded for further  
6 proceedings as the record is not developed sufficiently to remand with a direction for an  
7 award of benefits (*id.* at 18).

#### 8 STANDARD OF REVIEW

9  
10 Plaintiff bears the burden of proving disability within the meaning of the Social  
11 Security Act (hereinafter "the Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
12 1999); *see also Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995). The Act defines  
13 disability as the "inability to engage in any substantial gainful activity" due to a physical  
14 or mental impairment "which can be expected to result in death or which has lasted, or  
15 can be expected to last for a continuous period of not less than twelve months." 42 U.S.C.  
16 §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if plaintiff's  
17 impairments are of such severity that plaintiff is unable to do previous work, and cannot,  
18 considering plaintiff's age, education, and work experience, engage in any other  
19 substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A),  
20 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

21  
22 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
23 denial of social security benefits if the ALJ's findings are based on legal error or not  
24 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d

1 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.  
2 1999)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is  
3 such ““relevant evidence as a reasonable mind might accept as adequate to support a  
4 conclusion.”” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting Davis v.*  
5 *Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)); *see also Richardson v. Perales*, 402 U.S.  
6 389, 401 (1971). Regarding the question of whether or not substantial evidence supports  
7 the findings by the ALJ, the Court should ““review the administrative record as a whole,  
8 weighing both the evidence that supports and that which detracts from the ALJ’s  
9 conclusion.”” *Sandgathe v. Chater*, 108 F.3d 978, 980 (1996) (per curiam) (*quoting*  
10 *Andrews, supra*, 53 F.3d at 1039). In addition, the Court must determine independently  
11 whether or not ““the Commissioner’s decision is (1) free of legal error and (2) is  
12 supported by substantial evidence.”” *See Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir.  
13 2006) (*citing Moore v. Comm’r of the Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir.  
14 2002)); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

16 According to the Ninth Circuit, “[l]ong-standing principles of administrative law  
17 require us to review the ALJ’s decision based on the reasoning and actual findings  
18 offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the  
19 adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1226-27  
20 (9th Cir. 2009) (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation  
21 omitted)); *see also Molina v. Astrue*, 2012 U.S. App. LEXIS 6570 at \*42 (9th Cir. April  
22 2, 2012) (Dock. No. 10-16578); *Stout v. Commissioner of Soc. Sec.*, 454 F.3d 1050, 1054  
23 (9th Cir. 2006) (“we cannot affirm the decision of an agency on a ground that the agency  
24

1 did not invoke in making its decision”) (citations omitted). For example, “the ALJ, not  
 2 the district court, is required to provide specific reasons for rejecting lay testimony.”  
 3 *Stout, supra*, 454 F.3d at 1054 (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.  
 4 1993)). In the context of social security appeals, legal errors committed by the ALJ may  
 5 be considered harmless where the error is irrelevant to the ultimate disability conclusion  
 6 when considering the record as a whole. *See Molina, supra*, 2012 U.S. App. LEXIS 6570  
 7 at \*24-\*26, \*32-\*36, \*45-\*46; *see also* 28 U.S.C. § 2111; *Shinsheki v. Sanders*, 556 U.S.  
 8 396, 407 (2009); *Stout, supra*, 454 F.3d at 1054-55.

### 9 DISCUSSION

- 10
- 11 1. The ALJ failed in his duty to develop the record fully and fairly regarding  
 12 plaintiff’s hearing.

13 The ALJ “has an independent ‘duty to fully and fairly develop the record.’”  
 14 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (quoting *Smolen v. Chater*, 80  
 15 F.3d 1273, 1288 (9th Cir. 1996)). The ALJ’s “duty exists even when the claimant is  
 16 represented by counsel.” *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983) (per  
 17 curiam) (citing *Driggins v. Harris*, 657 F.2d 187, 188 (8th Cir. 1981)). This duty is  
 18 “especially important when plaintiff suffers from a mental impairment.” *Delorme v.*  
 19 *Sullivan*, 924 F.2d 841, 849 (9th Cir. 1991). However, the ALJ’s duty to supplement the  
 20 record is triggered only if there is ambiguous evidence or if the record is inadequate to  
 21 allow for proper evaluation of the evidence. *Mayes v. Massanari*, 276 F.3d 453, 459-60  
 22 (9th Cir. 2001); *Tonapetyan, supra*, 242 F.3d at 1150.

1 The ALJ found that plaintiff had the severe impairment of chronic ear infections  
2 with hearing loss (*see* Tr. 10); however the ALJ failed to include any limitations on  
3 plaintiff's residual functional capacity ("RFC") as a result of plaintiff's hearing loss other  
4 than the need to avoid exposure to noisy environments (*see* Tr. 12). The ALJ did not  
5 explain adequately his failure to include hearing loss in plaintiff's RFC or in the  
6 hypothetical presented to the vocational expert ("VE"), as discussed further below. As the  
7 ALJ relied explicitly on the VE's testimony in order to make his Step Five finding that  
8 plaintiff was "capable of making a successful adjustment to other work that exists in  
9 significant numbers in the national economy," this was not harmless error (*see* Tr. 17-18).

11 In February, 1992, plaintiff underwent surgery on his right ear, after a CT scan  
12 revealed the presence of extensive cholesteatoma in both ears (*see* Tr. 302, 316-17).  
13 Multiple ear bones had erosion and were removed, and the treatment record indicates that  
14 the "eustachian tube opening was found to be patent and there was no tympanic  
15 membrane covering it" (*see* Tr. 302). An audiogram conducted in March, 1992 indicates  
16 that plaintiff's speech discrimination was 96% in his left hear and only 68% in his right  
17 ear (Tr. 299). On July, 14, 1992, plaintiff underwent surgery on his left ear (*see* Tr. 279-  
18 80). It was noted at this time that plaintiff had "postoperative sensory neural hearing loss"  
19 (Tr. 279). Plaintiff has reported awakening during surgery and having to be re-  
20 anaesthetized (*see* Tr. 456).

22 On July 29, 1992, approximately two weeks after his second surgery, plaintiff  
23 appears to have reported that his pain was down and his hearing ability was increased  
24 (*see* Tr. 276). In September 25, 1992, plaintiff's speech discrimination in his left ear was

1 84% (*see* Tr. 290). An undated audiogram indicates greater level of hearing loss (Tr.  
2 481).

3 Plaintiff was examined by Dr. Samuel Gubbels, M.D. (“Dr. Gubbels”), on March  
4 7, 2003 (Tr. 271-72). Dr. Gubbels indicated plaintiff’s subjective report that “plaintiff  
5 states that he had a complete loss of his hearing on the right side after the surgery and a  
6 60% loss of hearing on the left” (*see* Tr. 271). Dr. Gubbels indicated what appears to be  
7 plaintiff’s subjective report that “his hearing overall does not seem to be changed” (*id.*). It  
8 does not appear from this treatment report that Dr. Gubbels tested plaintiff’s hearing.  
9

10 However, Dr. Gubbels performed an otomicroscopy on plaintiff (Tr. 272). Dr.  
11 Gubbels observed in plaintiff’s right ear that there was a “mild amount of erythema and  
12 honey crusting overlying the area;” the “cartilaginous external auditory canal [wa]s  
13 mildly stenotic; there [wa]s a mucoid discharge in the external auditory canal that [wa]s  
14 suctioned, revealing a granulation tissue underneath it with notable tenderness; Mastoid  
15 ball [wa]s full of cerumen;” and plaintiff’s tympanic membrane was thickened and mildly  
16 erythematous (*see* Tr. 272).

17 Defendant provided a few reasons as to why it may have been acceptable for the  
18 ALJ to fail to include plaintiff’s hearing loss into the RFC (*see* Response, ECF No. 26,  
19 pp. 8-9). However, these reasons were not provided by the ALJ in his October 28, 2009  
20 decision and “[l]ong-standing principles of administrative law require us to review the  
21 ALJ’s decision based on the reasoning and actual findings offered by the ALJ.” *Bray v.*  
22 *Comm’r of SSA*, 554 F.3d 1219, 1226-27 (9th Cir. 2009) (*citing Chenery Corp., supra*,  
23 332 U.S. at 196 (other citation omitted); *see also Molina, supra*, 2012 U.S. App. LEXIS  
24



1 6570 at \*42; *Stout, supra*, 454 F.3d at 1054 (the court generally does not “affirm the  
2 decision of an agency on a ground that the agency did not invoke in making its  
3 decision”). The Court notes, however, that despite defendant’s argument that plaintiff  
4 indicated that he was “doing well,” he also indicated at this same doctor’s appointment  
5 that he had a complete loss of hearing on the right side and a 60% percent loss on the left  
6 side (*see* Tr. 271).

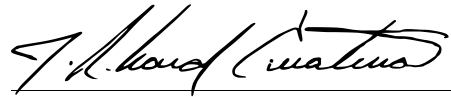
7       The record in this matter contains evidence that plaintiff suffered from hearing  
8 loss and the ALJ found that plaintiff had the severe impairment of chronic ear infections  
9 with hearing loss (*see* Tr. 10). The record is ambiguous regarding whether or not  
10 plaintiff’s alleged hearing loss resulted in any functional limitations that should have  
11 been taken into consideration as part of plaintiff’s RFC. *See Mayes, supra*, 276 F.3d at  
12 459-60; *Tonapetyan, supra*, 242 F.3d at 1150. The record is inadequate to allow for  
13 proper evaluation of the evidence regarding plaintiff’s hearing loss and any functional  
14 limitation which may have existed. *See Mayes, supra*, 276 F.3d at 459-60; *Tonapetyan,*  
15 *supra*, 242 F.3d at 1150.

16       This error was not harmless, as the ALJ relied on the VE’s testimony and this  
17 testimony was based on a hypothetical that included the avoidance of noisy environments  
18 as the only limitation required as a result of plaintiff’s alleged hearing loss (*see* Tr. 12,  
19 17-18). Therefore, the Court cannot affirm the ALJ’s ultimate finding regarding disability  
20 and this matter shall be reversed and remanded to the Commissioner for further  
21 administrative proceedings.  
22  
23  
24



1 **JUDGMENT** should be for plaintiff and the case should be closed.

2 Dated this 20th day of July, 2012.

3  
4 

5 J. Richard Creatura  
6 United States Magistrate Judge  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24